No. 92-1964

In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that a nurse's direction of less-skilled employees in the exercise of professional judgment and as an incident of patient care does not make the nurse a "supervisor" under Section 2(11) of the National Labor Relations Act (Act), 29 U.S.C. 152(11).

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-11a, is reported at 987 F.2d 1256. The decision and order of the National Labor Relations Board and the decision of the administrative law judge, Pet. App. 12a-76a, are reported at 306 N.L.R.B. 63.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1993. The petition for a writ of certiorari was filed on June 8, 1993, and granted on October 4, 1993, limited to the first question pre-

sented in the petition. J.A. 128. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3), provides in relevant part:

> The term "employee" shall include any employee * * * but shall not include * * * any individual employed as a supervisor * * *.

Section 2(11) of the Act, 29 U.S.C. 152(11), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(12) of the Act, 29 U.S.C. 152(12), provides in relevant part:

> The term "professional employee" means—(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily

> acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes * * *.

STATEMENT

1. Respondent owns and operates approximately 138 nursing homes in 27 States. This case involves the Heartland nursing home in Urbana, Ohio (Heartland). Heartland is a 100-bed facility. It is headed by an administrator, to whom several department heads report. One of these is the director of nursing (DON). Directly under the DON is the assistant director of nursing (ADON). Both the DON and the ADON are supervisors. Pet. App. 32a-35a.

The nursing department is staffed by approximately 65 personnel, including 9 to 11 staff nurses and 50 to 55 nurses' aides. Some of the staff nurses are registered nurses, while others are licensed practical nurses, but all have essentially the same duties. Pet. App. 34a-35a & n.5. Those duties include checking for changes in residents' health, administering medicine to residents, calling physicians when necessary, maintaining detailed records on treatment of residents, giving status reports to aides and to nurses on the next shift, handling incoming telephone calls from physicians and from relatives of residents who want information about a resident's condition, and, when an insufficient number of aides are working, bathing, feeding, or dressing residents. *Id.* at 36a. The nurses spend only "a small fraction of their time" exercising responsibilities regarding the aides.

Id. at 36a-37a. The aides, in turn, have the most contact with the residents; they bathe, dress, and feed them, and assist them with other aspects of routine care. *Id.* at 36a; J.A. 28, 52-54.

Heartland is divided into two wings. Pet. App. 34a. One staff nurse is always on duty in each wing, *id.* at 35a; the nurses work 12-hour shifts, from 7:00 a.m. to 7:00 p.m. or vice versa. *Id.* at 37a. The nurses' aides work eight-hour shifts beginning at 7:00 a.m., 3:00 p.m., and 11:00 p.m. There are six aides in each wing during the first shift, four in each wing during the second shift, and two in each wing (plus an aide who "float[s]" between wings) on the third shift. *Ibid.* The administrator, the DON, and the ADON work only during the day and on weekdays, *id.* at 46a, but the administrator and the DON are always on call, and nurses call them when non-routine matters arise. *Id.* at 47a; J.A. 4.

The duties of the aides off of the resident wings are assigned by Heartland's administrators. Pet. App. 39a. On the wings, the day-shift nurses tell each aide which residents are to be cared for by that aide. *Id.* at 38a. In making assignments, the nurses follow "old patterns" that have evolved over time, and generally allow aides to continue working with the same residents if the aides so desire. *Id.* at 39a. The night-shift nurses arrive four hours after the evening-shift aides have begun work, and they do not change the aides' assignments. *Id.* at 38a; J.A. 4-5. After aides are assigned to patients, nurses have little role in directing the performance of their duties. Pet. App. 40a; J.A. 54. Each of the aides can do the work of any other aide. Pet. App. 38a; J.A. 27-28.

If one wing is understaffed due to the absence of one or more aides, the nurse on that wing may ask

the nurse on the other wing to transfer an aide. The aides are usually allowed to decide which of them will change wings. Pet. App. 37a-38a; J.A. 73. A nurse may also obtain a replacement aide by telephoning the aides until locating one who is willing to come in; the nurse has no authority to order an off-duty aide to report to work. Alternatively, the nurse may see if an aide wishes to remain on duty after the end of the aide's shift on overtime, but the nurse cannot insist that any aide do so. Pet. App. 41a; J.A. 6-8, 43-44. The nurses otherwise have no authority to grant overtime. Nor may the nurses allow an aide to be absent for personal reasons. Pet. App. 42a. Nurses initial time cards showing an aide's overtime or late arrival and routinely report problems, such as absences, to Heartland's administrator or DON. *Id.* at 42a, 44a.

In case of misconduct or poor job performance by an aide, a nurse fills out an "employee counseling form" and delivers it to the administrator or the DON. Pet. App. 43a-44a. Such forms remain in the aides' personnel files, but have never resulted in disciplinary action being taken against an aide. The nurses never discipline the aides or threaten to do so, and they seldom recommend that an aide be disciplined. *Id.* at 44a-45a; J.A. 10-15, 24, 28-29, 94.

Heartland gives each employee a performance appraisal after the employee's probationary period and annually thereafter. Initially, the nurses did not participate at all in the evaluation process. Begin- about one month before respondent's actions at issue here, however, the nurses began to fill out parts of the evaluation forms for some aides, rating the aides in several categories. The nurses were specifically told not to give any aide an overall rating or to make

a recommendation with respect to continued employment. The nurses deliver the forms to their superiors and do not participate in the separate meetings between each aide and the administrator or the DON, at which the evaluations are discussed. J.A. 21, 82-83, 88-89, 91-93. There is nothing to indicate that the nurses' role in the evaluation process has any impact on the aides' jobs. The aides' pay levels depend on seniority, and Heartland does not promote them. Pet. App. 43a, 45a-46a.

2. The Board's General Counsel issued a complaint alleging that respondent violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by issuing disciplinary warnings to several staff nurses, and later discharging three of them, for engaging in concerted activity designed to improve their working conditions and those of other employees.[1] Respondent contended that its actions with respect to the nurses were taken for legitimate reasons, and that, in any event, the nurses were "supervisors" under Section 2(11) of the Act,

[1] Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. 158(a)(1). Section 7 of the Act, 29 U.S.C. 157, grants employees the right, *inter alia*, to engage in "concerted activities for the purpose of * * * mutual aid or protection." The alleged unfair labor practices related to respondent's discipline of certain nurses and discharge of three of them after they requested a meeting with Heartland's administrator, and later met with one of respondent's officials, to discuss problems with respondent's "disparate enforcement of its absentee policy, short staffing, low wages for nurses aides, [respondent's] unreasonably switching its prescription business from one pharmacy to another, which increased the nurses' paper work, and management's failure to communicate with employees." Pet. App. 13a-14a.

29 U.S.C. 152(11), and were therefore not entitled to the protections of the Act. Pet. App. 33a.

a. The administrative law judge (ALJ) determined that Heartland's nurses are not "supervisors" within the meaning of Section 2(11) of the Act. Pet. App. 33a-49a. In so finding, the ALJ examined the nurses' functions in relation to the relevant activities considered supervisory under Section 2(11) and concluded that respondent "does not endow its nurses with the kind of authority" that would make them "supervisors for purposes of the Act," but instead treated them as "hired hands." Pet. App. 49a.

Assignment. The ALJ observed that the day-shift, but not the night-shift, nurses are involved in assigning the aides to care for residents. He found, however, that the nurses' responsibilities in that regard did not require the use of "independent judgment" as that phrase is used in Section 2(11). Pet. App. 38a-40a.

The ALJ also found that the nurses have no authority to require aides to work overtime or to request aides to work overtime because of the press of work. They can only offer overtime assignments to aides who are off duty (or scheduled to go off duty) in order to fill in for absent colleagues. Similarly, the nurses' authority to allow aides to leave early is limited to instances of sickness. Pet. App. 41a-43a.

Direction. The ALJ concluded that, "[o]nce the aides have their assignments, there is little for the nurses to do in the way of 'directing' them." Pet. App. 40a. While nurses may, for example, "issue orders related to any change in the condition of a resident," such as observing the resident closely or taking his temperature, the nurses' direction of the work of the aides does not amount to "responsibly

* * * direct[ing]" the aides "in the interest of the employer," since "the nurses' focus is on the well-being of the residents rather than of the employer." *Ibid.* "[T]he direction the nurses give to the aides," he added, "is closely akin to the kind of directing done by leadmen or straw bosses, persons who Congress plainly considered to be 'employees.'" *Ibid.*

Reward, promotion, discipline, and evaluation. The ALJ found that the nurses have no role in rewarding or promoting aides because the aides' pay level is not tied to performance, but "depends solely on their seniority," and because aides are not promoted. Pet. App. 43a. He also found that the nurses have no real role in disciplining or discharging aides because the nurses' criticism of aides' performance does not affect their job status. Although the nurses report problems about an aide's work to the administrator or the DON and may attend disciplinary conferences, the nurses do not themselves penalize, threaten to penalize, or (with minor exceptions) recommend penalties for the aides. *Id.* at 43a-45a.

Other factors. The ALJ acknowledged that the nurses are the "senior personnel present" during weekends and the evening and night shifts. Pet. App. 46a. He noted, however, that the administrator and the DON are always on call and are in fact often called when the nurses have to deal with a non-routine matter. *Id.* at 47a. The ALJ also examined the ratio of supervisors to employees (depending on whether the nurses are considered supervisors or not), but concluded that specific ratios are not dictated by the Act. *Id.* at 47a-48a.

"[A]nalyzing the situation at Heartland on the basis of the criteria that are spelled out in Section 2(11)," the ALJ concluded that "the nurses simply

do not possess supervisory authority."[2] Pet. App. 48a.

b. The Board affirmed the ALJ's determination that the nurses are employees, not statutory supervisors. Pet. App. 13a n.1. While clarifying that the ALJ had erred in his assumption, *id.* at 44a & n.7, that the General Counsel had the burden of proving that the nurses are not supervisors and reiterating that "[t]he party alleging supervisory status * * * bears the burden of proving an individual is a supervisor," the Board held that, in any event, "the preponderance of the evidence [in this case] establishes that the nurses are employees."[3] *Id.* at 13a n.1.

3. Respondent filed a petition for review, and the court of appeals vacated the Board's order. Pet. App. 1a-11a. With respect to the Board's test for determining whether nurses are supervisors, the court of appeals observed that "there is a history of conflict" between the Board's approach and decisions of the Sixth Circuit.

> The Board has always taken the position that a nurse is not a supervisor when her conduct is in the furtherance of the patient's interest. The Board maintains that nurses are working for the patient's interests, not the interests of their

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[2] The ALJ then found that respondent's issuance of certain disciplinary warnings violated the Act, but that respondent had not violated the Act by issuing other disciplinary warnings and by discharging three nurses. Pet. App. 49a-72a.

[3] The Board then found that respondent had violated the Act with respect to the disciplinary actions and discharges of the nurses at issue. Pet. App. 17a-27a; see note 1, *supra*. Those determinations of the Board are not at issue here.

> employers. Therefore, the Board maintains that nurses should not be considered to be supervisors under the Act.

Id. at 8a. The court noted, however, that in *NLRB* v. *Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987), and *Beverly California Corp.* v. *NLRB*, 970 F.2d 1548 (6th Cir. 1992), it had held that "if a nurse's actual functions performed met the statutory criteria for being a supervisor, then the nurse would not be disqualified because he/she was engaged in 'mere patient care.'" Pet. App. 8a. The court also noted that it has rejected the Board's view that the burden to establish that an individual is a supervisor rests on the party who asserts it, *id.* at 6a, 8a; instead, the court places the burden on the Board to establish "non-supervisory status." *Id.* at 10a.

Having rejected the Board's legal determinations, the court of appeals held that "the duties of a staff nurse at Heartland nursing home clearly require both assigning aides to specific tasks and directing the operation of the aides, as well as the entire nursing home, when the Director of Nursing or his/her assistant is not present." Pet. App. 10a. The court thus concluded that the staff nurses had the authority to "assign" and "responsibly direct" aides within the meaning of Section 2(11) of the Act. Pet. App. 9a-10a. Because of its finding that the nurses are statutory supervisors, the court of appeals vacated the Board's order without reaching the issue of whether respondent's discipline and discharge of the nurses was unlawfully motivated. *Id.* at 11a.

SUMMARY OF ARGUMENT

The Board's rule in this case is that a nurse is not a "supervisor" within the meaning of Section 2 (11) of the Act when the nurse's direction of other employees is carried out in the exercise of professional judgment and is incidental to the treatment of patients. That rule is a reasonable interpretation of the statute and is entitled to judicial deference.

A. Congress excluded supervisors from the Act's protections in order to ensure that management could rely on the undivided loyalty of its representatives. The exclusion, however, was not designed to reach those with minor supervisory responsibilities who were in need of the protection of the Act and who did not exercise true management power. Accordingly, the language of the supervisory exception is limited to personnel who act "in the interest of the employer" with respect to the supervision at issue and who exercise authority that "is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. 152(11). The scope of the supervisory exception is further limited by the Act's coverage of professional employees, 29 U.S.C. 152(12), who generally supervise less-skilled personnel. The task of reconciling these statutory directives and implementing the policies of the Act with regard to supervisors belongs to the Board, whose rules must be upheld by the courts if they are "rational and consistent with the Act." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987).

B. The Board's experience in applying the Act in the health care field has led it to conclude that when a nurse's direction of less-skilled employees flows

from professional and patient-care interests, that direction does not constitute statutory supervision. In 1974, Congress amended the Act to cover private non-profit hospitals. Although proposals were made to exclude professional health care employees from the definition of supervisor, Congress concluded that this approach was unnecessary in light of the Board's rule that a health care professional's direction of other employees "in the exercise of professional judgment, * * * incidental [to] the professional's treatment of patients, * * * is not the exercise of supervisory authority in the interest of the employer." S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974). Since that time, the Board has adhered to the same principle, which, as this Court has noted, "Congress expressly approved in 1974." *NLRB* v. *Yeshiva University*, 444 U.S. 672, 690 n.30 (1980).

C. The Board's rule is rational and consistent with the Act. The conflict of loyalties that the supervisory exception is designed to avoid is not threatened when a nurse directs employees in reliance on professional norms rather than managerial policies promulgated by the employer. The distinction drawn by the Board between action "in the interest of the employer" and professional action in furtherance of patient care is thus responsive to Congress's dual concerns: to guarantee management the loyalty of its agents, while preserving the Act's protections for minor supervisory personnel. The rule is also consistent with the statutory scheme; indeed, the failure of the Board to limit the supervisory exception as applied to professionals would thwart Congress's purpose to afford coverage to them, because professionals normally oversee the work of at least some other persons. This Court recognized that precise point in *Yeshiva*, in approving the general approach of the Board that is at issue here.

D. Applying the Board's test to this case, the nurses in question are not supervisors. The court of appeals suggested that the nurses engage in only two activities deemed supervisory under Section 2(11): assigning work to the aides and responsibly directing them. But the findings of the ALJ, upheld by the Board, establish that, to the extent that the nurses' actions were not purely routine, the nurses acted in the interest of patient care, in accordance with professional norms. Accordingly, the Board's finding that the nurses are protected employees should be upheld.

ARGUMENT

THE BOARD'S TEST FOR DETERMINING WHETHER A NURSE'S DIRECTION OF LESS-SKILLED EMPLOYEES MAKES THE NURSE A SUPERVISOR IS A REASONABLE INTERPRETATION OF THE ACT

A. The Determination Of Supervisory Status Under The Act Requires The Board To Balance Competing Interests

The original Wagner Act afforded organizational rights to "employee[s]" and provided no express exclusion for supervisors. Act of July 5, 1935, ch. 372, § 2(3), 49 Stat. 450. Accordingly, the Board, with this Court's approval, permitted supervisory employees, such as foremen, to join labor organizations and required employers to bargain with those employees' representatives. *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947). In 1947, however, Congress responded by amending the definition of employee in the Act to exclude supervisors. Labor Management

Relations Act, ch. 120, Tit. I, § 101, 61 Stat. 137-138 (codified at 29 U.S.C. 152(3)). The amendment's purpose was to ensure an employer the undivided loyalty of its representatives, who, if they were afforded a protected right to join or form unions, might be subject to control by the same union as the employees they were supposed to be supervising on the employer's behalf. H.R. Rep. No. 245, 80th Cong., 1st Sess. 13-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 4-5 (1947).[4] The exemption was not designed to sweep in all employees who give some direction to others, however. The Senate Labor Committee observed that, "[i]n framing th[e] definition [of 'supervisor'] the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory," S. Rep. No. 105, *supra*, at 19, and possess "genuine management prerogatives," *id.* at 4.[5]

[4] The same policy of avoiding conflicts of interest underlies the Act's implied exclusion for "managerial employees" who are involved in developing and enforcing employer policy. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

[5] Congress adopted the definition of "supervisor" in the Senate bill, which was more limited than that in the House bill. See *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 181-184 (1981). The Senate Committee explained that it was not "unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in the act." S. Rep. No. 105, *supra*, at 4. Accordingly, it "distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees * * * and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." *Ibid.* The definition of "supervisor" described in the Senate Committee Report was amended on the floor to include individuals who had authority "responsibly to direct" others, but that amendment was not intended to encompass the "minor" supervisory employees that the Senate Committee had meant to exclude from the definition of a supervisor. See 93 Cong. Rec. 4,677-4,678 (1947).

The language of Section 2(11), which defines the term "supervisor," reflects that congressional intention. 29 U.S.C. 152(11). "Supervisor" is defined to mean:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The scope of the supervisory exception is thus limited to personnel who act "in the interest of the employer" with respect to an activity listed in the statute *and* who exercise authority that is neither routine nor clerical, but demands the application of "independent judgment." The task of identifying what actions satisfy those limiting conditions is left to the expertise of the Board.

The supervisory exception is also limited by another aspect of the statute. The Act extends protection to professional employees, a catgory that, as defined in Section 2(12), 29 U.S.C. 152(12), covers employees who have duties requiring the "consistent exercise of discretion and judgment." Because most professionals have some supervisory authority to di-

rect another's work, the Board must distinguish between supervision in the statutory sense and work direction by a professional employee that is merely an exercise of the customary duties of that person's profession. Failure to draw such a distinction would negate Congress's intention to afford the protection of the Act to professional employees.

In light of the interplay of the Act's definitions and its policies with respect to the exclusion of supervisors from employee status, the Board's task is to develop rules that will avoid the conflicts of interest triggered by covering true supervisors, without denying the Act's protection to "employees with minor supervisory duties," S. Rep. No. 105, *supra*, at 4, or to professionals. Judicial review of the Board's rules is deferential, limited to assuring that they are "rational and consistent" with the statute. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990). As this Court has noted, the Board has "a large measure of informed discretion" in determining when the "authority 'responsibly to direct' the work of others" requires a finding of supervisory status. *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 179 n.6 (1962), quoting *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961).

B. The Board's Longstanding Approach To Determining Supervisory Status In The Health Care Field Is The Product Of Experience And Has Been Endorsed By Congress

Because of the frequent interaction of professional employees with other types of employees in hospitals and nursing homes, the Board has accumulated a

large body of experience in determining supervisory status in the health care field.[6] The seminal decision is *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950 (1970), enforced, 489 F.2d 772 (9th Cir. 1973). In that case, the Board found that a hospital's registered nurses were not supervisors although they directed other, less-skilled employees with respect to the work to be performed for patients and ensured that such work was done. The Board explained that the nurses' "daily on-the-job duties and authority in this regard are solely a product of their highly developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their [e]mployer." 183 N.L.R.B. at 951. The Board distinguished *Sherewood Enterprises, Inc.*, 175 N.L.R.B. 354 (1969), in which it had found the same hospital's floor nurses to be supervisors, "because, *in addition to* performing their professional duties and responsibilities, [the floor nurses] also possessed the authority to make effective recommendations which affected the job status and pay of the

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[6] The Board first asserted jurisdiction over private proprietary hospitals and nursing homes in 1967. *Butte Medical Properties*, 168 N.L.R.B. 266 (1967) (overruling *Flatbush General Hospital*, 126 N.L.R.B. 144 (1960)); *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967). The National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395, extended the Board's jurisdiction to the employees of non-profit health care facilities. See *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1544-1545 (1991). In the Board's rulemaking on appropriate bargaining units in acute-care hospitals, which this Court upheld in *American Hospital Ass'n, supra*, the Board determined that one appropriate bargaining unit would be a unit consisting of "[a]ll registered nurses." 29 C.F.R. 103.30(a)(1).

employees working on their wings." 183 N.L.R.B. at 951-952.[7]

In 1974, Congress "expressly approved" the Board's approach to determining supervisory status in the health-care field. *NLRB v. Yeshiva University*, 444 U.S. 672, 690 n.30 (1980). In enacting the National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395, which brought private non-profit hospitals under the Act, both the Senate and House Committees rejected a proposal to exclude health care professionals from the definition of supervisor in Section 2(11).[8] After studying the proposal "with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians,"

[7] In earlier decisions, the Board had found that certain nurses who scheduled and assigned work did not do so in a manner requiring the exercise of independent judgment. *Diversified Health Services, Inc.*, 180 N.L.R.B. 461 (1969); *New Fern Restorium Co.*, 175 N.L.R.B. 871 (1969). That is also a basis for declining to deem nurses to be supervisors. See 29 U.S.C. 152(11) (excluding from the definition of supervisor a person whose "authority is * * * of a merely routine or clerical nature" and does not require "independent judgment").

[8] See *Extension of NLRA to Nonprofit Hospital Employees: Hearings Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 16-18 (1973) [*House Hearings*] (statement of Charles Hargett, R.N., American Nurses' Association); *id.* at 22-23 (remarks of Rep. Ashbrook); *Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1973: Hearings on S. 794 and S. 2292 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 112-113 (1973) [*Senate Hearings*] (statement of Bonnie P. Graczyk, R.N., American Nurses' Association).

the Committee reports explained that the proposed amendment was unnecessary in light "of existing Board decisions."

> [T]he Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974); see also H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974) (same).[9] Each Committee added that it "expects the Board to continue evaluating the facts of each case in this manner when making its determinations." *Ibid.*

Since 1974, the Board's application of its rule regarding supervisory status has conformed to Congress' expectations. In determining the supervisory status of nurses, the Board has first inquired whether the authority that a nurse exercises over less-skilled employees is of a "routine nature," or requires the use of "independent judgment." If the authority is

[9] Congress was informed by an official of the Department of Labor, in the hearings leading to the 1974 amendments, that "in the proprietary hospitals and nursing homes the NLRB has * * * shown an ability to make necessary distinctions and to fashion workable rulings. For example, the Board has not generally deemed registered nurses to be supervisors, although they direct the work of nonprofessionals or less skilled people." *Senate Hearings, supra*, at 427 (statement of Richard S. Schubert, Undersecretary of Labor).

of a "routine nature," similar to the instruction given to other employees by a leadman in a factory, the Board finds that the authority is not sufficient to make a nurse a supervisor. See Pet. App. 39a-40a; *Waverly-Cedar Falls Health Care, Inc.*, 297 N.L.R.B. 390, 393 (1989), enforced, 933 F.2d 626 (8th Cir. 1991); *Beverly Enterprises, Alabama Inc.*, 304 N.L.R.B. 861, 863-864 (1991). When the nurse's authority involves the exercise of independent judgment, the Board draws a distinction between a nurse's direction of aides that is incidental to the delivery of patient care, on the one hand, and the possession of authority over personnel, such as the authority to affect the job status or pay of aides, on the other. Only in the latter case is the nurse found to be acting "in the interest of the employer" as that phrase is used in Section 2(11). *Ohio Masonic Home, Inc.*, 295 N.L.R.B. 390, 395 (1989), citing *Beverly Manor Convalescent Centers*, 275 N.L.R.B. 943, 947 (1985); *Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181, 192 (1976). The Board has consistently followed that approach in determining the supervisory status of health care professionals, such as nurses.[10]

[10] See, e.g., *Wing Memorial Hospital Ass'n*, 217 N.L.R.B. 1015, 1016-1017 (1975) (registered nurse, who "controls" operating room, recovery room, and central supply room, is a statutory supervisor because she evaluates, schedules, and transfers employees, and makes effective recommendations about job applicants after interviewing them); *Presbyterian Medical Center*, 218 N.L.R.B. 1266, 1268 (1975) (registered nurses who serve as charge nurses and as team leaders are not statutory supervisors because "their duties are generally limited to giving directions in the performance of their professional duties"); *Meharry Medical College*, 219 N.L.R.B. 488, 490 (1975) (charge nurses perform routine direction not requiring use of independent judgment); *Newton-Wellesley Hospital*, 219 N.L.R.B. 699, 700 (1975) (test for determining whether a nurse is a supervisor is "whether that individual, who may give direction to other employees in the exercise of professional judgment which is incidental to the professional's treatment of patients, also exercises supervisory authority in the interest of the employer"); *Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181, 192 (1976) (head nurses and their assistants were not statutory supervisors, since they "perform duties and functions predominantly in the 'exercise of professional judgment' incidental to their treatment of patients" and do not have "the authority to make effective recommendations with respect to the hiring, firing, transfer, or discipline of subordinates"); *Turtle Creek Convalescent Centres, Inc.*, 235 N.L.R.B. 400, 400 n.3. (1978) (applying standard approved in 1974 Senate Committee Report); *Misericordia Hospital Medical Center*, 246 N.L.R.B. 351, 352 (1979) (same), enforced, 623 F.2d 808 (2d Cir. 1980); *Mount Airy Foundation*, 253 N.L.R.B. 1003, 1008 (1981) (nurses "devote much of their time to direct patient care, and their direction of the staff nurses and nurse assistants is incidental to their treatment of patients. * * * [A]ssignments again are made in the exercise of their professional judgment with respect to the employees' abilities and the patients' needs"); *French Hospital Medical Center*, 254 N.L.R.B. 711, 713 (1981) (charge nurses' assignment of employees to teams is "a routine function," not indicative of supervisory status); *Read Memorial Hospital*, 265 N.L.R.B. 789, 791 (1982) ("While [the nurse] gave directions to other employees, those directions appear always to have been incidental to her treatment of patients * * *."); *Springfield Jewish Nursing Home for the Aged, Inc.*, 292 N.L.R.B. 1266, 1267 (1989) ("The routine assignment and direction of employees regarding patient care does not confer supervisory status on a charge nurse.").

As this Court has observed, "it may not always be realistic to infer approval of a judicial or administra-

tive interpretation from congressional silence alone. * * * But once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979) (citations omitted). See also *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 535 (1982); *CBS, Inc.* v. *FCC*, 453 U.S. 367, 382-385 (1981); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). That principle applies with even greater force in this case, since, as this Court noted in *Yeshiva*, "Congress expressly approved in 1974" the Board's approach in the health care field of asking "in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." *Yeshiva*, 444 U.S. at 690 n.30, citing S. Rep. No. 766, *supra*, at 6.[11]

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[11] Contrary to the suggestion of the court of appeals in *Beverly California Corp.* v. *NLRB*, *supra*, footnote 30 in *Yeshiva* does not endorse the view that a single committee report "could * * * alter the meaning of [the] statute." 970 F.2d at 1554 n.7. Rather, the footnote recognizes Congress's approval of the interpretation that the Board had previously given to the supervisor exception. That congressional recognition—noted in both the House and Senate committee reports accompanying a major extension of the Act and providing the explanation for Congress's rejection of a specific provision for health care professionals—is entitled to weight. See *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969) (committee reports represent "the considered and collective understanding of those Congressmen involved in drafting and studying [the] proposed legislation").

C. The Board's Rule Is Rational And Consistent With The Statute

The Board's rule—that a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, does not make the nurse a supervisor within the meaning of Section 2(11) of the Act—is "rational and consistent with the Act"; accordingly, it is "entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. at 42.

1. The Board's test is a rational means of implementing Congress's intention that employees with "minor" authority over other employees not be denied the protections of the Act. As Congress recognized, the employer's interest in the undivided loyalty of its supervisory personnel does not justify the denial of organizational rights to all persons exercising some direction over others.[12] The line that the Board has drawn in the health care field is responsive to Congress's concerns.

Because of their expertise, nurses often play a pivotal role on the team of employees that delivers care to patients in a hospital or nursing home. Even when a nurse's responsibilities include the assignment or direction of the work of aides, the nurse's functions will seldom involve the formal exercise of managerial power that characterizes the position of supervisor. Rather, in assigning aides to specific patients, informing aides of the priorities in their work, and instructing aides in the proper methods of attending to patients, nurses are making essentially professional judgments. The nurses' professional training teaches them to take measures that will

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[12] See notes 4-5, *supra*, and accompanying text.

provide good patient care; in conveying instructions to others, they rely on those professional norms rather than on managerial policies formulated by the employer.[13] Such an exercise of authority in the interest of patient care does not align the nurses with management, and granting such nurses organizational

[13] As a representative of the American Nurses' Association explained to Congress, see *House Hearings, supra,* at 16-17:

> The health team providing the actual care to the patients within the unit may consist of several types of personnel—the nursing aide, the practical nurse and the registered nurse. The registered nurse, as the professional and the most educated of this group, provides the direction for the care of the patient. In this sense, the senior nurse or head nurse or the nurse "in charge" of the nursing care unit or of a group of patients, functions as a patient care coordinator, determining the patient's needs, determining who among the staff shall care for the patient, and providing the advice and consultation needed by less prepared or less experienced team members. The nurse utilizes professional judgment in providing direct care to patients and in evaluating whether good and adequate patient care is being given by others, whether medical directives are being carried out appropriately and whether records are adequately maintained within the unit so that continuity of patient care can go on despite the shifts in personnel.
>
> Almost all nurses exercise independent judgment and *professional authority* to direct other employees. Few, however, possess the "bureaucratic" authority envisioned in the NLRA definition of "supervisor"—to effectively recommend hiring, firing, promotion and discharge. In nursing, the term "supervisor" should be limited to those registered nurses who truly and substantially possess and exercise such authority over other registered nurses. In present-day hospitals, such true supervisors are typically limited to the director of nursing and her immediate assistants and associates.

rights does not threaten the conflicting loyalties that the supervisor exclusion was designed to avoid.

That is not to say that the nurses are acting *contrary* to the interest of the employer, as the court of appeals seemed to assume that the Board's rule implied. *Beverly California Corp.* v. *NLRB*, 970 F.2d at 1553; *NLRB* v. *Beacon Light Christian Nursing Home*, 825 F.2d at 1079; see Pet. App. 8a-9a (relying on those cases). The Board's test does not suggest that the employer's business interest and the nurse's interest in providing good patient care are mutually exclusive. Of course, "there is naturally a coincidence of interests so that by catering to patient needs and providing necessary care, the employer's broader interests are also advanced. Obviously, even rank and file employees, and not only supervisors, are employed to work for the advancement of an employer's interests." *Beverly Manor Convalescent Centers*, 275 N.L.R.B. at 946-947. See *United Brewery Workers* v. *NLRB*, 298 F.2d 297, 303 (D.C. Cir. 1961) ("The entire work force from the president down to the messenger boy in one sense acts in the interest of the employer, as Congress well knew."), cert. denied, 369 U.S. 843 (1962).

If it is to have significance, however, the statutory requirement that supervisory authority be exercised "in the interest of the employer," 29 U.S.C. 152(11), must mean more than acting in a way that furthers the employer's business interests. The Board's rule gives that requirement substance by considering whether the authority at issue implements management's business norms or the employee's professional norms. When nurses wield control over such assignment issues as who works what shift, effectively recommend or impose discipline, or effectively recom-

mend or grant promotions or wage increases, the need for the employer to have the undivided loyalty of its agents is present, and the Board has accordingly found the nurses to be supervisors. See, *e.g.*, *Sherewood Enterprises, Inc.*, 175 N.L.R.B. at 354-355; *Trustees of Noble Hospital*, 218 N.L.R.B. 1441, 1442 (1975). But "no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the [employer's] profit-maximizing objectives." *Children's Habilitation Center, Inc.* v. *NLRB*, 887 F.2d 130, 134 (7th Cir. 1989). Accordingly, the Board's rule rationally implements the policy of the statute. Compare *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 190 (1981) (upholding, as a "reasonable" rule, the Board's determination to exclude from bargaining units those confidential employees who assist managers that have labor-relations authority, but not to exclude confidential employees who have no "labor nexus").

2. The Board's rule is also consistent with the statute. The court of appeals apparently believed that the Board's rule violates a literal reading of the words "assign" and "responsibly to direct" other employees "in the interest of the employer" in Section 2(11), 29 U.S.C. 152(11). See Pet. App. 7a-8a. The statutory criterion of having authority "in the interest of the employer," however, must not be read so broadly that it overrides Congress's intention to accord the protections of the Act to professional employees. 29 U.S.C. 152(12).

The definition of "professional employee" covers "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants." H.R. Rep. No. 510, 80th Cong.,

1st Sess. 36 (1947). If all it took to be a statutory supervisor were a showing that an employee gives discretionary direction to an aide, even though done pursuant to the customary norms of the profession, the coverage of professionals would be a virtual nullity. As one court has explained, "[s]upervision in the elementary sense of directing another's work is excluded [from Section 2(11)]; a supervisor under the statute must have authority over another's job tenure and other conditions of employment. This distinction is important because the Act allows professionals—doctors, teachers, etc.—to bargain collectively * * * yet most professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on." *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983).[14]

[14] The particular employees involved in this case are licensed practical nurses. Pet. App. 12a-13a. Unlike registered nurses, who are professional employees, licensed practical nurses are considered "technical" employees. The Board, however, applies the same test of supervisory status to licensed practical nurses as it does to registered nurses where, as here, they have the same duties as registered nurses. See, *e.g.*, *Madeira Nursing Center, Inc.*, 203 N.L.R.B. 323, 324 (1973) (registered and licensed practical nurses not supervisors where work assignments and directions they give to aides and orderlies "are either in accord with the scheduling done by the director of nursing or dictated by the needs of the patients," and they "do not have any authority to affect, either directly or by making effective recommendations, the employment status" of those working under their direction); *Ohio Masonic Home, Inc.*, 295 N.L.R.B. 390 & n.1, 394-395 (1989); *id.* at 396; cf. *NLRB* v. *Res-Care, Inc.*, 705 F.2d at 1466 (licensed practical nurses "are, if not full-fledged professionals, at least sub-professionals").

This Court has previously concluded that the Board's general approach to determining the supervisory status of professionals, in the health care field as in other fields, properly harmonizes the Act's protection of professionals with the employer's prerogative to have a cadre of agents with undivided loyalty to it. In *NLRB* v. *Yeshiva University, supra,* the Court, while concluding that certain university professors were excluded from the Act as managers (see note 4, *supra*), stated:

> We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.

444 U.S. at 690 (footnote omitted). In a footnote, the Court referred to the Board's application of those principles in a variety of contexts, including cases in the health care field, *id.* at 690 n.30,[15] and concluded

[15] In footnote 30, the Court cited Board decisions and stated that "architects and engineers functioning as project captains for work performed by teams of professionals are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members. * * * See also *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950, 951-952 (1970), enf'd, 489 F.2d 772 (CA9 1973) (nurses) * * *." *Yeshiva*, 444 U.S. at 690 n.30. The Court specifically noted that in 1974 Congress "expressly approved" the Board's test in the "health-care context." *Ibid.* See note 11, *supra*, and accompanying text.

that those "decisions accurately capture the intent of Congress." *Id.* at 690. This Court's view in *Yeshiva* that the Board's approach "accurately capture[d]" Congress's intent confirms the consistency of the Board's rule with the statutory scheme.

The rule that the Court rejected in *Yeshiva* is quite different from the rule at issue in this case. In *Yeshiva*, the Board argued that Yeshiva University's faculty were not managerial employees, because, although the faculty participated in academic governance, the University anticipated that they would do so exercising "independent professional judgment," and did not expect them to conform to management policies or judge them for effectiveness in doing so. *Yeshiva*, 444 U.S. at 684. The Court rejected that broad argument, which it said "could result in the indiscriminate recharacterization as covered employees of professionals working in supervisory and managerial capacities." *Id.* at 687. Instead, it found the "controlling consideration" on the facts of that case to be that the "faculty of Yeshiva University exercises authority which in any other context unquestionably would be managerial"; using the "industrial analogy," the Court stated that "the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served." *Id.* at 686.

In this case, the nurses' authority to assign or direct the work of aides would not unquestionably be supervisory in any other context. To the contrary,

the ALJ, upheld by the Board, found that "the direction the nurses give to the aides is closely akin to the kind of directing done by leadmen or straw bosses," Pet. App. 40a, and that "the actions of Heartland's administrator proclaimed in unmistakable fashion that, to [respondent's] management, Heartland's nurses were just hired hands." *Id.* at 49a. A nurse's direction of aides, in the exercise of professional judgment incidental to the treatment of patients, is analogous to the university professors' authority to "determine the content of their own courses, evaluate their own students, and supervise their own research"—customary professional responsibilities which the Court, in *Yeshiva*, stated would not be sufficient to exclude professors from the protections of the Act. 444 U.S. at 691 n.31.

The Board's rule does not afford the protections of the Act to individuals merely because of their professional status, even though they may have been vested with true supervisory or managerial authority, as the Court found was the case with the university faculty in *Yeshiva*. When a nurse is vested with such authority, the Board will find the nurse to be a supervisor. But when the direction of aides or assignment of their tasks is simply an extension of the professional duties that the nurse is trained to perform, the Board is not required by the statute to deny to the nurse the protections of the Act. Indeed, to do so would undermine Congress's express purpose for amending the Act in 1974: to afford nurses and other health care workers the right to improve their conditions of employment through organization and collective bargaining. See *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 497 (1978) ("The elimination of the nonprofit hospital exemption reflected Con-

gress' judgment that hospital care would be improved by extending the protection of the Act to nonprofit health-care employees.").[16]

D. The Nurses In This Case Do Not Possess Supervisory Authority Under The Board's Test

Under the Board's approach, the nurses in this case are protected employees, not statutory supervisors.[17] The ALJ found that, apart from having occasionally to switch an aide from one wing to another, the night-shift nurses had no role in assigning work to aides. When the nurses on that shift come

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[16] In its recent rulemaking on appropriate bargaining units in acute-care hospitals, see note 6, *supra*, the Board noted the difficult employment conditions that nurses face. See *Collective-Bargaining Units in the Health Care Industry; Second Notice of Proposed Rulemaking*, 53 Fed. Reg. 33,900, 33,912-33,913 (1988) (low salaries of registered nurses employed in hospitals); *id.* at 33,916 (severe shortage of registered nurses creating stress on the job); *id.* at 33,928 (nurses employed in nursing homes generally receive lower salaries than their counterparts in acute-care hospitals).

[17] The Board has determined that the burden of proof on the issue of supervisory status falls on the party alleging the existence of such status. See Pet. 19-22. Although the court of appeals has rejected that position and has held that "[t]he Board always has the burden of coming forward with evidence showing that the employees are not supervisors," *NLRB* v. *Beacon Light Christian Nursing Home*, 825 F.2d at 1080, that issue is not dispositive here, because the Board found that, in any event, "the preponderance of the evidence [in this case] establishes that the nurses are employees." Pet. App. 13a n.1. Other courts of appeals have upheld the Board's position on the burden of proof issue. See, *e.g.*, *NLRB* v. *Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991); *Schnuck Markets, Inc.* v. *NLRB*, 961 F.2d 700, 703 (8th Cir. 1992).

on duty the four aides already there have previously been given their assignments by the day-shift nurses. Pet. App. 38a. He further found that, while the day-shift nurses "have the authority to vary the aides' assignments in ways that can make a difference to the aides, and they are expected to exercise judgment in exercising that authority," the nurses follow "old patterns" that have evolved over time, and generally allow aides to continue working with the same residents if the aides so desire. *Id.* at 39a. The "nature of the aides' work is not highly technical," and "[e]very aide is able to do the work of every other aide." *Id.* at 38a-39a. Accordingly, the ALJ found that "the aide assignment duties of the nurses seem to me to fall well short of 'requir[ing] the use of independent judgment,' as that expression is used in Section 2(11)." *Id.* at 40a.

The ALJ also found that the nurses' direction of the aides did not qualify as statutory supervision. The nurses have authority to criticize an aide for improperly performing a task, to tell an aide to redo a task inadequately done, to direct an aide to do chores not covered by the assignment sheet, to issue orders related to any change in the condition of the resident, and to tell aides when to take their work breaks (although, in practice, the aides usually work that out among themselves). Pet. App. 40a. The ALJ concluded, however, that this does not equate to "responsibly * * * direct[ing]" the aides "in the interest of the employer" because "the nurses' focus is on the well-being of the residents rather than of the employer." *Ibid.* The ALJ added that "the direction the nurses give to the aides is closely akin to the kind of directing done by leadmen or straw bosses,

persons who Congress plainly considered to be 'employees.' " *Ibid.*

The court of appeals did not reject any of the ALJ's underlying factual findings. Rather, the crux of the court's decision is its rejection of the Board's established rule that a nurse's assignment and direction of the work of less-skilled aides, in the exercise of professional judgment and incidental to the nurses' treatment of patients, does not transform the nurses into supervisors under the Act. Pet. App. 8a-10a. The court of appeals acknowledged that aide assignments are "based primarily upon the needs of the patients," *id.* at 9a-10a, because "[c]ertain patients may require more aides based on the patients' physical and mental infirmities," *id.* at 10a n.2. But based on its disagreement with the Board's rule, the court summarily found that the nurses are supervisors because "[a]mong a staff nurse's functions are the authority to assign the nurses aides and to responsibly direct them." *Id.* at 9a.

The court of appeals did not dispute that any assignment and direction in this case, to the extent it was not purely routine, was done by the nurses as an incidental aspect of patient care, in accordance with professional standards. If the nurses in this case are deemed to be supervisors based on the slight showing of authority over aides relied upon by the court of appeals, it would remove a major group of employees from the Act's protection with little or no advancement of the purpose of the supervisory exception. The Board's test prevents such misapplications of the statute. Because the court of appeals erred in rejecting the Board's rule, and because there is no other basis in the record for finding respondent's

nurses to be supervisors, the Board's conclusion that the nurses are protected by the Act should be upheld.[18]

[18] Respondent suggests that, in the alternative, the nurses could be found to be supervisors under another branch of Section 2(11) because they "play a crucial role in the disciplinary and evaluative processes in the facility." Br. in Opp. 5. As we explained at the certiorari stage, see Pet. Reply Br. 1-5, that contention lacks merit; the extensive findings of the ALJ establish that the nurses did not discipline or evaluate the aides. Respondent also errs in stating that the ALJ "ignore[d]" the nurses' job description or the ratio of employees to supervisors in the nursing department if the nurses are not supervisors. Br. in Opp. 5 n.4; see also *id.* at 9 n.9. The ALJ properly went beyond the nurses' job description and determined that, in fact, the authority that the nurses had over the aides was not sufficient to meet the Section 2(11) criteria for supervisory status. Pet. App. 37a-46a. And the ALJ noted that specific ratios are not dictated by the Act and cannot overcome other evidence that is inconsistent with supervisory status. *Id.* at 48a. The ALJ acknowledged that the nurses are the "senior personnel present" during weekends and the evening and night shifts. *Id.* at 46a. He noted, however, that the administrator and the director of nursing are always on call and are in fact often called when the nurses have to deal with a non-routine matter. *Id.* at 47a.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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